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No. 82-1577

In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JOINT APPENDIX

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Probable Jurisdiction Noted October 17, 1983
Appeal Docketed March 22, 1983

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Statutes Involved

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b. Michigan Agricultural Marketing and Bargaining Act ..... J.S. App A89

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NOTE: As allowed by Rule 30.1, materials contained in the jurisdictional statement are not reproduced in the joint appendix. In such cases, reference is made to the page of the jurisdictional statement appendix ("J.S. App") at which the materials may be found.

INGHAM COUNTY CIRCUIT COURT
CIVIL DOCKET

Case No. 74-16369-CZ

Date	Proceedings
3/7/74	Complaint filed
3/7/74	Summons Issued
4/26/74	Order of Dismissal as Per Opinion of the Court - LOB 158, pp. 414, 415 filed
5/3/74	Opinion of the Court Re: Order to Enter Granting Defendants' Motion For Dismissal filed LOB 157, pp. 308, 309, 310
5/14/74	Application for Leave to Appeal and Designation of Appeal as Emergency Appeal Under GCR 1963, 806.5 with Proof of Service filed
5/14/74	Claim of Appeal with Proof of Service filed
10/28/74	Order from Court of Appeals Granting Motion to Dismiss Appeal, and Order Dismissing Motion to Expedite Appeal and Motion for Limited Remand filed
10/28/74	Order from Court of Appeals Granting Motion for Immediate Consideration; and Order Denying Leave to Appeal from Judgment of Circuit Court and Order Dismissing Motion to Expedite Appeal and for Limited Remand filed
1/20/75	Order from Supreme Court Granting Application for Leave to Appeal filed
12/13/76	Order from Supreme Court of State of Michigan Reversing Judgment of Circuit Court and Remanding to Circuit Court for Further Proceedings filed
12/13/76	Order from Supreme Court of State of Michigan Denying Application for Rehearing filed

Date	Proceedings
6/27/77	Answer of Defendant Michigan Agricultural Cooperative Marketing Association, Inc. filed
6/29/77	Verified Answer of Defendant, Agricultural Marketing and Bargaining Board with Proof of Service filed
9/6/77	Trial before the Court without a jury—Proofs in Part J 109 pg. 62
9/7/77	Trial Continued—Proofs in Part J 109 pg. 63
9/8/77	Trial Continued—Proofs in Part J 109 pg. 64
9/12/77	Trial Continued—Proofs in Part J 109 pg. 69
9/13/77	Trial Continued—Proofs in Part J 109 pg. 70
9/19/77	Trial Continued—Proofs in Part J 109 pg. 78
9/20/77	Trial Continued—Proofs in Part J 109 pg. 79
9/21/77	Trial Continued—Proofs in Part J 109 pg. 80
9/22/77	Trial Continued—Proofs in Part J 109 pg. 81
9/26/77	Trial Continued—Proofs in Part J 109 pg. 86
9/26/77	Trial Concluded—Taken Under Advisement - J 109 pg. 87
2/2/81	Opinion of the Court filed
3/31/81	Order filed
3/9/83	Notice of Appeal to the Supreme Court of the United States and Proof of Service filed
3/11/83	Supreme Court Order that the Agricultural Marketing and Bargaining Act is constitutional and that the accreditation procedures of the Agricultural Marketing and Bargaining Act are subject to the provisions of the Administrative Procedures Act filed

COURT OF APPEALS DOCKET

Case No. 20309

Date	Proceedings
5/14/74	Claim of Appeal filed
5/14/74	Motion to Expedite Appeal
5/21/74	Motion to dismiss claim of appeal
10/22/74	Order granting motion to dismiss; dismiss motion to expedite as moot
11/12/74	Application for Leave to Appeal to Supreme Court filed
1/15/75	Application Granted
8/30/76	Opinion of Supreme Court filed
12/14/76	Order of Supreme Court certified 12/9/76 reversed and remanded to Ingham County Circuit Court

COURT OF APPEALS DOCKET

Case No. 20310

Date	Proceedings
5/14/74	Application for Leave to Appeal
5/14/74	Motion for immediate consideration, and motion for expedited appeal
10/22/74	Order granting motion for immediate consideration; denying application for leave to appeal; denying motion to expedite
11/12/74	Application for Leave to Appeal to Supreme Court filed
1/15/75	Application Granted
8/30/76	Opinion of Supreme Court filed
12/14/76	Order of Supreme Court certified 12/9/76 reversed and remanded to Ingham County Circuit Court

MICHIGAN SUPREME COURT DOCKET

Case No. 56434

Date	Proceedings
11/8/74	Application filed
12/2/74	Brief in opposition filed
1/15/75	Application Granted with instructions regarding issues and making a record
10/10/75	Argued and submitted
8/25/76	Reversed and remanded, jurisdiction retained
9/13/76	Application for rehearing filed
9/13/76	Motion for clarification of opinion filed
11/1/76	Motion for clarification GRANTED with instruction, motion to amend complaint GRANTED
12/9/76	Application for rehearing DENIED
2/6/81	Circuit court opinion on remand filed
6/4/81	Argued and submitted # 10
12/23/82	Opinion—statute constitutional (opinion released 2/1/83)
3/4/83	Remittitur and circuit court record returned
3/8/83	Notice of appeal to US Supreme Court filed
3/22/83	Notice from US Supreme Court of filing of appeal

EXCERPTS FROM THE TESTIMONY OF RANDALL TORGERSON

Taken in the Ingham County Circuit Court

(Filed September 26, 1977)

[Caption Omitted In Printing]

Proceedings had and taken before the Honorable Thomas L. Brown (P11303), Circuit Court Judge, at the Ingham County Circuit Courtroom, City Hall, Lansing, Michigan, on Wednesday, September 21, 1977.

Appearances: Ernest M. Sharpe, Esq., in behalf of plaintiffs

James A. White Esq. in behalf of defendant Michigan Agricultural Cooperative Marketing Association

Henry J. Boynton Esq. in behalf of defendant Michigan Agricultural Marketing and Bargaining Board

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[1071] RANDALL TORGERSON Ph. D.

having first been duly sworn testified as follows:

DIRECT EXAMINATION

BY JAMES A. WHITE Esq.:

Q. Would you please give your full name and address for the record? A. Yes, Randall Everett Torgerson, 1300 Tulane Drive, Alexandria, Virginia.

Q. And, Dr. Torgerson, with whom are you employed? A. I'm employed by the Farmer Cooperative Service, U.S. Department of Agriculture.

Q. And what position do you hold? A. I'm Administrator of the agency.

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[1074] Q. Okay. And when did you get your present position? A. I was asked by the Secretary of Agriculture to take on the job as Administrator of the Farmer Cooperative Service in October, 1975, and have been in that position since that time.

Q. Okay. Dr. Torgerson, have you published any books? A. I have two books "Producer Power at the Bargaining Table: A Case Study of the Legislative Life of Senate Bill S-109," published by the University of Missouri Press in 1970. I also published a book entitled "Farm Bargaining," which is a case study of bargaining efforts in Norway and Sweden. That was published by the Landbruksforlaget in Norway in 1971.

Q. Okay. Dr. Torgerson, I believe one book you mentioned that you are the author of is "Producer Power at the Bargaining Table: A Case Study of the Legislative Life of Senate Bill 109." Could you explain to the Court what that is, S-109? A. Well, S-109 was the popular bill name for what is now the [1075] Agricultural Fair Practices Act of 1967. It was signed into law in 1968, and it was a study of the kind of pulling and pushing that went on in the Legislature with that Bill from 1967 until it was signed into law in 1968 by President Johnson.

Q. Have you written, in addition to those books, have you written other articles regarding agricultural marketing and bargaining? A. Yes, I've written a number of articles and had many speeches on group action in agriculture published in various periodicals.

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[1103] Q. Okay. Now, one of the arguments that have been made by the Plaintiffs, and they have a section in their Brief dealing with pre-emption of the Michigan Act by the Federal Fair Practices Act, which was ap-

parently this Act S-109 that you wrote your book on? A. Right.

Q. And in there, in the section of their trial Brief, they have opined that it is impossible to comply with the Michigan Act without triggering federal enforcement action, and that such [1104] federal enforcement shows that the Michigan Act would be in actual conflict with the federal law. Now, as the administrator for the Farmer Cooperative Service for the United States Department of Agriculture, do you have any knowledge as to the likelihood of federal action seeking to prevent the operation of the Michigan Act such as a federal action being based on the contention that the Michigan Act is in conflict with the federal act? A. Yes, I do.

Q. Okay. Now, what is your opinion in that regard? Do you have knowledge in that regard, then?

MR. SHARPE: Your Honor, at this point I'd like to object to that question. First of all, it hasn't been shown that this witness is in a position to make a determination wheher indeed enforcement action will be brought; secondly, this witness is being asked a conclusion of law whether—related to whether one act pre-empts another act. That's the issue here, not whether action will be brought or will not be brought. He's been qualified as an economist, not as a lawyer. He hasn't been—he is not listed as one of the attorneys in this case, he's not been listed as the judge; I don't think he's qualified to render an opinion on the pre-emption question, which is, I believe, strictly a matter of law.

THE COURT: I don't understand Mr. White's [1105] question to ask him whether he has an opinion on the pre-emption aspect, but whether the likelihood of the federal action. I think I'd have to sustain the objection to the

extent there is a lack of foundation. I don't know what his connection is with the Justice Department or whoever would bring this sort of action.

MR. WHITE: I'd be happy to ask him that.

THE COURT: All right.

Q. (MR. WHITE) Dr. Torgerson, did you receive a copy—did our office send you a copy of the trial Brief that was written in this case? A. Yes, dated Sepember 6, 1977, yes.

Q. Okay. Now, did you take that as the administrator of the Farmer Cooperative Services of USDA, did you take that to the attorneys that you deal with for the USDA? A. I did, with a copy of the Michigan Bargaining Act.

Q. Okay. Then did they give you an opinion as to whether they would enforce, as the attorneys, what you should do regarding the enforcement of this?

THE WITNESS: Yes, they did give me an opinion.

MR. WHITE: Okay, what was that opinion?

MR. SHARPE: Objection, hearsay.

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[1107] THE COURT: Well, the material fact before the Court is not whether the Michigan Act pre-empts the federal act, but the material fact is whether or not the federal authorities intend to take some action as alleged by the Plaintiffs against the Michigan Act. Now, it seems to the Court that the statement which certainly is out of court—the declarant is out of court, not available for cross examination, [1108] and the declarant is clearly the attorneys representing the U.S. Department of Agriculture. But it appears that the statement is more probative on the

point, on that point than any other evidence which could be readily procured through reasonable efforts. So I think it bears a certain reasonable reliability. I doubt very much the administrator for that section of the USDA would appear here and not indicate to us what he was advised by attorneys for the Department. I don't think we need go beyond why they have that belief, I mean they can be subpoenaed for that purpose, for the purpose of material acts before us, I think it's the exception to the hearsay rule, and I will overrule the objection.

MR. SHARPE: Your Honor, could I also make one other statement? I believe it's irrelevant simply whether a federal agency would enforce a statute really is not determinative of the question of whether one statute pre-empts another, whether one statute violates another, is inconsistent with one another.

THE COURT: I'm not indicating that what has been offered as a material fact here has any bearing on the pre-emption issue. That apparently is not before me; it's not part of the question.

MR. WHITE: I think the Supreme Court has indicated that pre-emption argument is.

THE COURT: That may be, it's not part of your [1109] question, you're not asking the witness that question; that's not the material fact here. All right, let's adjourn for lunch. Mr. White is going to take you to lunch.

Q. (MR. WHITE) Dr. Torgerson, just before we broke for lunch, I was asking whether as a result of the activities that you have described, it's likely that the U.S. Department of Agriculture would seek to prevent the operation of Michigan Act 344 of the Public Acts of 1972, and I believe the ruling was you could go ahead with that. Okay, would you answer that, then? A. It's very unlikely.

THE COURT: Now, wait, I note on the record that's based on the foundation of the matters previously stated.

MR. WHITE: Yes, that's right, yes.

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CROSS EXAMINATION

[1128] Q. (By Mr. Sharpe) Let me pick up something else. You mentioned that you apparently talked to somebody in the Justice Department or the USDA, and they told you that they wouldn't bring an action against anybody because they were operating under this Act, isn't that right? A. I testified that on the basis of my appearance here, as I frequently do in my role as administrator of Farmer Cooperative Service, since legal issues come up, you know, not infrequently, that I sent a copy of the Plaintiffs' Trial Brief, September 6, 1977, and a copy of PA 344 to our marketing contact in the Office of General Counsel of USDA and asked them to review and study that particular item and to advise me on [1129] what I could or could not say in testimony. That's what I did.

Q. That was something you did getting ready to testify for this case, then? A. In part, but we also are in a situation where we are kind of looking out for potential sources of conflicts and what have you between state and federal levels. It's not infrequently that we go to our general counsel for questions of clarification of that nature, irregardless of whether there is a case involved or not.

Q. And you were told nothing would be done? A. That is correct, I was told that there's no appearance here of conflict between statutes.